Habeas Corpus — Extradition Cases

When the Constitution of the United States was adopted, it provided that:

> A person charged in any state with treason, felony, or other crime who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime.[1]

By this clause, the power to regulate interstate extradition is delegated to the Federal Government, and in pursuance thereof, laws of Congress have been passed specifying the judicial acts which are necessary to authorize a demand, such as the production of a copy of an indictment found or an affidavit made before a magistrate of any state or territory charging the person so demanded with having committed a crime, and making the certificate of the executive authority conclusive as to verity when presented to the executive of the state wherein the fugitive is found.[2] But the governor of the asylum state may not legally be compelled to deliver up an accused; his duty has been held to be a mere moral obligation.[3]

In order to facilitate the procedure, thirty states have passed the Uniform Criminal Extradition Act.[4] Under this act, the accused need not be a fugitive from justice in the demanding state,[5] and this has been held to be constitutional,[6] although the Federal Constitution and the Congressional statutes provide only for the rendition of fugitives.

Section 10 of the Uniform Act provides that:

> If the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus.

This comment is concerned with the extent of the court's inquiry in the consideration of an application for habeas corpus; by one under arrest under a warrant of the governor of the state in which he was arrested, in compliance with a request for interstate rendition made by the governor of another state in which the prisoner allegedly committed a crime. The writ will test the validity of the detention only, and thus the sole question for determination is whether or not the prisoner is subject to interstate rendition.

---

[1] U.S. CONST. ART. IV §2.

[2] REV. STAT. §5278 (1878), 18 U.S.C. §3182 (Cong. Serv. 1948).

[3] Kentucky v. Dennison, 24 How. 66 (U.S. 1860).

[4] Ala., Ariz., Ark., Cal., Del., Idaho, Ill., Ind., Kan., Me., Md., Mass., Mich., Minn., Mont., Nebr., N.H., N.Mex., NY., N.Car., Ohio, Ore., Penna., S.Dak., Utah, Vt., W.Va., Wis., Wyo.

[5] UNIFORM CRIMINAL EXTRADITION ACT §6; *But see* §2.

[6] English v. Matowitz, 148 Ohio St. 39, 72 N.E. 2d 898 (1947).

Under the Constitution[7] and the pursuant federal statute,[8] a prisoner, arrested under warrant of extradition, must be: (1) substantially charged with a crime under the criminal laws of the demanding state.[9] It has been established that the word "crime" in the Constitutional provision for extradition of fugitives from justice as between states, embraces every act forbidden and made punishable by a law of the demanding state including misdemeanors; (2) a fugitive from justice, and this has been determined to mean that he must have been in the demanding state at the time the criminal act charged was committed and subsequently have left that state for any purpose;[10] (3) the person charged with a crime and indicated by the warrant. This is to be distinguished from the question of whether or not he is the person who committed the crime. This latter determination is for the trial court of the demanding state; (4) arrested under a warrant regular on its face. This last requirement is common to all arrests and, therefore, will not be discussed in this comment.

The governor of the state of asylum must in his determination of the issuance of a warrant consider all of these factors, and they are the points of inquiry open to investigation by the court on a writ of habeas corpus. The action of the governor is presumed to be lawful, however, and the burden of proof of any defect in the issuance of the warrant is therefore on the prisoner.[11]

CHARGE OF A CRIME

The obligation to surrender depends upon the criminal law of the demanding state and not the law of the state of asylum.[12] The governor of the asylum state having determined in the first instance that the indictment or affidavit submitted to him with the requisition of the governor of the demanding state, and certified by the latter as authentic, contains a substantial charge of a crime, and having issued his warrant for the arrest of the fugitive, the person arrested may have such determination reviewed on habeas corpus.[13] Upon such review the executive warrant, if in due form, is prima facie proof that a crime has been charged. The presumption thus prevailing is not conclusive, and the governor's warrant for rendition is subject to judicial review. If it were otherwise, say the courts, the governor would be clothed with arbitrary and despotic

[7] U.S. CONST. ART. IV §2.

[8] REV. STAT. §5278 (1878), 18 U.S.C. §3182 (Cong. Serv. 1948).

[9] Drew v. Thaw, 235 U.S. 432 (1914).

[10] *Contra*: UNIFORM CRIMINAL EXTRADITION ACT §6.

[11] Chase v. State, 93 Fla. 963, 173 So. 103 (1927); See note, 54 A.L.R. 271 (1928).

[12] Collins v. Loisel, 259 U.S. 309 (1921).

[13] Pierce v. Creecy, 210 U.S. 387 (1908).

power, and there would be no uniform action in such matters in the various states.[14] Whether the accused is charged with a crime is a jurisdictional question and always open to judicial inquiry.[15]

FUGITIVE FROM JUSTICE

Except under the Uniform Criminal Extradition Act or where otherwise provided by statute, the prisoner must be a fugitive from justice in the demanding state. Here again a warrant is presumptive, but not conclusive, evidence that the prisoner is a fugitive from justice,[16] but is rebuttable in habeas corpus proceedings.[17] Whether or not the prisoner is a fugitive is a question of fact.[18] If it is clearly shown that he was not within the demanding state when the crime was alleged to have been committed and his extradition is sought on the ground of constructive presence only, the court will ordinarily discharge the prisoner.[19] Mere absence from the scene of the crime, by way of alibi, may not be shown unless probative of the fact that the accused is not a fugitive.[20] It is, in general, the duty of the governor where requisition is made for the extradition of an alleged fugitive from justice to determine, in the first instance, whether such person is in fact a fugitive within the meaning of the extradition laws. While there have been some doubts expressed as to the power of the courts to review such determination,[21] courts have generally held it not to be conclusive.[22] The decided weight of authority is to the effect that the mission, motive, or purpose inducing a person accused of being a fugitive to leave the demanding state is immaterial.[23] The prisoner need not have known that he had committed a crime when he left the state.[24] Some few courts hold contra.[25] The minority holdings are on the basis of the voluntary nature of departure. But a prisoner who has been removed from the demanding state by federal authorities

[14] *Ex parte* Owen, 10 Okla. Crim. Rep. 284, 136 Pac. 197 (1913).

[15] Roberts v. Reilly, 116 U.S. 80 (1885).

[16] McNichols v. Pease, 207 U.S. 100 (1907).

[17] Hyatt v. Corkran, 188 U.S. 691 (1902), *In re* Hubbard, 201 N.C. 472, 160 S.E. 569 (1931); *See* note, 81 A.L.R. 547.

[18] Roberts v. Reilly, 116 U.S. 80 (1885).

[19] South Carolina v. Bailey, 289 U.S. 412 (1932), *Contra*: UNIFORM CRIMINAL EXTRADITION ACT §6.

[20] State *ex rel.* Davey v. Owen, 133 Ohio St. 96, 12 N.E. 2d 144 (1937); *See* note, 114 A.L.R. 686.

[21] Appleyard v. Mass., 203 U.S. 222 (1906), Biddinger v. Police Comr., 245 U.S. 128 (1917).

[22] Jones v. Leonard, 50 Iowa 106, 32 Am. Rep. 116 (1878), People *ex rel.* Corkran v. Hyatt, 172 N.Y. 176, 64 N.E. 825 (1902), *Aff'd* 188 U.S. 691 (1902).

[23] Hogan v. O'Neill, 255 U.S. 52 (1921), Drew v. Thaw 235 U.S. 432 (1914).

[24] Roberts v. Reilly, 116 U.S. 80 (1885), Biddinger v. Police Comr., 245 U.S. 128 (1917).

[25] *See* note 13 A.L.R. 415, 420.

is nevertheless a fugitive from justice in an asylum state.[26] Departure from a jurisdiction after the commission of an act in furtherance of a crime subsequently consummated is a flight from justice and renders the fugitive liable to extradition.[27]

The accused must produce "conclusive" proof that he was not in the demanding state.[28] In some jurisdictions the proof need only be "clear and convincing,"[29] in others it must be beyond a "reasonable doubt,"[30] "or substantial and convincing,"[31] but the conclusive proof test is the desirable one,[32] for the accused need only raise a reasonable doubt, at the trial, in the demanding state.

A state may in the exercise of its reserved sovereign powers and as an act of comity to a sister state, provide by statute for surrender, on requisition, of persons who are indictable for a crime committed through their *constructive presence,* even though they have never been corporeally within such state and have never fled therefrom to escape arrest or punishment.[33] In the absence of a statute, a state may not render a person unless he is a fugitive.[34]

Where a man has contributed to the support of his wife and children at all times before leaving the state but stops payments after he leaves, he is not a fugitive.[35] Due to the continuing nature of the crime of abandonment or nonsupport of a wife or children, an exception has been established to the majority rule that one must be in the state when the crime is committed. It is to the effect that the temporary presence within the state, although for an innocent purpose, of one charged with neglect to support his wife and children is sufficient to charge him with being a fugitive from justice upon his departure again from the demanding state.[36]

An accused person arrested in interstate proceedings, who sues out habeas corpus to obtain his discharge on the ground that he is not a fugitive from justice, is not entitled to introduce evidence to prove that after the date of the alleged offense he was "usually and publicly resident" within the demanding state for a time sufficient to bar the prosecution under its limitation statutes. The statute of

[26] State *ex rel.* Shapiro v. Wall, 187 Minn. 246, 244 N.W. 811 (1932), *See* note 85 A.L.R. 114.

[27] Strassheim v. Daily, 221 U.S. 280 (1910).

[28] *Ex parte* Rabinowitz, 65 P. 2d 1236 (Okla. Cr. App. 1937).

[29] McNichols v. Pease, 207 U.S. 100 (1907).

[30] South Carolina v. Bailey, 289 U.S. 412 (1933).

[31] State v. Westhues, 318 Mo. 928, 2 S.W. 2d 612 (1928).

[32] 22 MINN. L. REV. 431 (1937).

[33] UNIFORM CRIMINAL EXTRADITION ACT §6, State v. Hall, 115 N.C. 705, 20 S.E. 729 (1894).

[34] U.S. CONST. ART. IV §2.

[35] Taft v. Lord, 92 Conn. 539, 103 Atl. 644 (1927), Chase v. Florida, 93 Fla. 963, 113 So. 103 (1927).

[36] Chase v. Florida, *supra* note 35.

limitations is a defense and must be asserted on the trial by the defendant in criminal cases; matters of defense can not be heard on habeas corpus to test the validity of an arrest in extradition, but must be heard and decided at the trial, by the courts of the demanding state.[37]

IDENTITY OF THE ACCUSED

The determination of the fact of identity of the person arrested as the person named in the executive warrant is always open to judicial inquiry.[38] The burden of proving the identity of the prisoner rests on those seeking his extradition when he denies on habeas corpus that he is the person for whom the warrant was issued.[39] A prima facie case is made out by the state, however, if it shows that the name of the prisoner and the name set forth in the warrant are identical.[40]

MOTIVE OR ULTERIOR PURPOSE OF OFFICIALS

As a general rule, the courts on habeas corpus will not inquire into motives which induced a governor to honor or refuse a requisition, since such an inquiry would be opposed both to the plainest principles of public policy and to the freedom of action by the executive within his constitutional authority.[41]

The reasons given for the majority rule are: (1) executive discretion is not subject to court review;[42] (2) the matter of motive is one of defense cognizable solely in the courts of the demanding state; (3) if the prisoner is guilty of the offense it is no defense for him to allege improper motive.[43] On the other hand, some courts assert that under some circumstances the motive which lies behind an extradition request may be a matter for consideration of the court under habeas corpus. It is necessary for the demanding state to show that requisition is for the purpose of subjecting the prisoner to prosecution for the offense charged, and not merely to subverse private malice or to obtain service on him for some other purpose.[44] The rule in Oklahoma is that in every extradition case the question of good faith of both the demanding and rendering

[37] Biddinger v. Police Comr., 245 U.S. 128 (1917).

[38] Lee Gim Bor v. Ferrari, 55 F. 2d 86 (1st Cir. 1932); *See* note, 84 A.L.R. 329; UNIFORM CRIMINAL EXTRADITION ACT §20.

[39] Barnes v. Nelson, 23 S.D. 181, 121 N.W. 89 (1909); *See* note, 84 A.L.R. 339; Huie Fong v. Bligh 55 F. 2d 189 (1st Cir. 1932); *See* note, 84 A.L.R. 341.

[40] State *ex rel.* Grande v. Bates, 101 Minn. 303, 112 N.W. 260 (1907); *See* note, 84 A.L.R. 341.

[41] Collins v. Traeger, 27 F. 2d 842 (9th Cir. 1928).

[42] Gaskins v. Davis, 115 N.C. 85, 20 S.E. 188 (1894).

[43] Flower v. Superintendent of Phil. County Prison, 220 Pa. 401, 69 Atl. 916 (1908).

[44] *In re* Bruchman, 28 N.D. 358, 148 N.W. 1052 (1914).

state is open to inquiry on habeas corpus.[45]

In Ohio, prior to the adoption of the Uniform Criminal Extradition Act, there was a statute providing that the demand for extradition must be made in good faith for the punishment of crime and not for the purpose of the collection of a debt or to remove the alleged fugitive to a foreign jurisdiction to serve him with civil process.[46] A Pennsylvania court released a Negro boy because of the strong possibility of his being lynched or otherwise deprived of a fair trial.[47] Courts had previously held that the danger of being lynched is not sufficient reason for refusing to extradite the fugitive.[48] In habeas corpus the limitation of inquiry is as to jurisdiction but it has been held that a possibility of a sufficient denial of due process is jurisdictional.[49]

CONCLUSION

The necessity for extradition procedure arose out of the demand on the part of the states that their sovereign powers be maintained. The Extradition Clause of the Federal Constitution[50] is a grant by the states of power to the Federal Government to control extradition. Since the adoption of the Constitution the states have seen fit to relinquish even more of their sovereign power by passing statutes which let down some of the barriers encountered in attempting to arrest a person who has committed a crime against the demanding state and who is, at the time of the requisition for extradition, within the boundaries of another state.

Attempts have been made to eliminate the problem. The Fugitive Felon Act[51] makes it a crime to flee from the jurisdiction of a

[45] *Ex parte* Offutt, 29 Okla. Crim. Rep. 401, 234 Pac. 222 (1925).

[46] *In re* Williams, 5 Ohio App. 55 (1915).

[47] Mattox v. Superintendent of Prisons, 152 Pa. Super. 167, 31 A. 2d 576 (1943), 53 YALE L. J. 359 (1943).

[48] Ople v. Weinbrenner, 285 Mo. 365, 226 S.W. 256 (1920), *cert. denied*, 256 U.S. 695 (1921).

[49] Johnson v. Zerbst, 304 U.S. 458 (1938).

[50] U.S. CONST. ART. IV §2.

[51] 18 U.S.C. §1073 (Cong. Serv. 1948): "Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for murder, kidnapping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, or extortion accompanied by threats of violence, or attempt to commit any of the foregoing offenses as they are defined either at common law or by the laws of the place from which the fugitive flees, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by imprisonment in a penitentiary is charged, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

"Violations of this section may be prosecuted only in the federal judicial district in which the original crime was alleged to have been commited or in which the person was held in custody or confinement."

state to avoid prosecution for certain enumerated crimes. A fugitive arrested for the violation of the act may after his arrest apply for a writ of habeas corpus. The court in consideration of his application may consider only two things: (1) the identity of the prisoner, and (2) the regularity of the warrant.[52] The questions of whether or not he is a fugitive and whether he fled to avoid prosecution for *a crime* are elements of the crime defined by the act and must be tried in the district in which the *original* crime is alleged to have been committed. To charge a violation of this act it is only necessary to charge that the accused left a state with the intent to avoid prosecution for one of the enumerated crimes.[53] The purpose of this act is to make it unnecessary to extradite a person who may be brought within the purview of the statute.[54] The act provides no immunity from criminal or civil process and a fugitive returned under the act is, therefore, subject to indictment for the original crime.[55] This statute does not cure the difficulty in the case of a crime not enumerated in the act and does not cover those crimes committed by *constructive presence.* The Uniform Criminal Extradition Act takes care of the constructive presence problem but extradition, at best, is a cumbersome process and depends on the efficiency of the police of the state of asylum for its success.

There is no good reason why a person should be able to commit a crime and then hide behind the sovereign skirts of an asylum state. It would, therefore, seem reasonable to make extradition between the states as simple as arrest and removal where a person has committed a crime in another county of the same state.

The only danger of such simplified procedure is that an innocent person might be caused some inconvenience. It has been pointed out, by those who would retain strict rules of extradition, that some person wishing to obtain personal service on another who was immune from civil process in the home state of the first person, might "trump" up a criminal charge in order to have his adversary

[52] Barrow v. Owen, 89 F. 2d 476 (5th Cir. 1937).

[53] Jackson v. .S., 131 F. 2d 606 (8th Cir. 1942).

[54] Report No. 1458 of the House Committee on the Judiciary May 3, 1934, 73rd Congress, 2d Session: "One of the most difficult problems which local law-enforcement agencies have to deal with today is the ease with which criminals are able to flee from the state to avoid prosecution, and witnesses leave the state to avoid giving testimony in criminal proceedings. The above bill is considered the most satisfactory solution of this problem, which the states have never been able to solve effectively. This bill will not prevent the states from obtaining extradition of roving criminals, but the complicated process of extradition has proved to be very inefficient. The ability of federal officers to follow a criminal from one state to any other state or states, as provided in the above bill, should furnish the desired relief from this class of law evaders."

[55] U.S. v. Conley, 80 F. Supp. 700 (D. Mass. 1948).

brought within the accuser's state. To this argument it might, in the first place, be answered that the justice of the present lack of extraterritorial personal service in civil suits is doubtful. A better answer is the use, in connection with a simple extradation procedure, of the safeguard employed in the Ohio extradition statute.[56] This would afford sufficient immunity to civil process to eliminate the so-called danger. Beyond such a safeguard the accused has remedies at law to combat malicious prosecution and false arrest.

The only questions that need be decided on habeas corpus are the identity of the accused and the sufficiency of the warrant. If the accused is guilty of a crime in the demanding state it seems unnecessary to consider the question, eliminated by the Uniform Act, of whether or not the prisoner is a fugitive. Since the criminal law of the demanding state is controlling, it would seem desirable to permit the courts of that state to determine whether or not a crime is charged.

John G. McCune

[56] OHIO GEN CODE §109-25: "A person brought into this state by or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in any civil action in this state until he has been convicted in the criminal proceedings, or if acquitted, until he has had reasonable oppportunity to return to the state from which he was extradited."

Under the Uniform Act in most states it is provided that the immunity from civil process appllies only to civil actions arising out of the same facts as the criminal proceeding which he is being or has been returned to answer.